UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

In re:	Case No. 98-32055-WS
ROGER D. DRURY and KATHERINE A. DRURY,	Chapter 7
	Hon. Walter Shapero
Debtors.	

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OPINION DENYING TRUSTEE'S MOTION TO COMPROMISE THE ESTATE'S OBJECTION TO THE CLAIM OF LEWIS WOODY, JR.

This matter is before the Court upon the Motion for Authority to Compromise filed by Samuel Sweet, the trustee in this Chapter 7 case ("Trustee") and the objection to that Motion filed by the debtors, Roger D. Drury and Katherine A. Drury ("Debtor" or "Drury"). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding which the Court may hear and determine. 28 U.S.C. § 157(b)(2)(A). The following constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

I. Procedural Posture

On September 14, 1998, Roger and Katherine Drury filed a Voluntary Petition for Relief under Chapter 11 of the Bankruptcy Code. On July 5, 2000, the case was converted to Chapter 7, and Samuel Sweet was appointed as trustee of the Chapter 7 case. On October 30, 2000, Lewis Woody, Jr. ("Woody") filed an unsecured claim against the Chapter 7 bankruptcy estate in the amount of $197,236.44 (Claim No. 34). Both the Trustee and Debtors filed objections to that claim. The Court initially heard arguments on those objections, following which the Court set an evidentiary hearing on the claim's allowance. Before that hearing was held, the trustee filed an

Application to Compromise that claim for $134,000.00, alleging that such is in the best interest of the estate. The Debtors filed an Objection to the trustee's Application to Compromise and an initial hearing thereon was held, followed by an evidentiary hearing after which the Court took the matter under advisement.

During the course of the hearings, the Trustee testified that the financial situation of this bankruptcy estate is such that it has in excess of $100,000 in cash; the only other remaining material claim is that of the Internal Revenue Service, which in reality may be less than half of that amount (and it might be or become less than that); and the sole other remaining claim of any material amount, is Woody's. If the Woody claim is disallowed in whole or in substantial part, the Debtor will, therefore, receive back substantial monies. On the other hand if it is allowed, even in the proposed compromised amount, the Debtor will not receive anything back and Woody would receive substantial, if not all, of the remaining amounts available for distribution. Thus, the real protagonists and antagonists and beneficiaries here are Woody and the Debtors. Thus, in a real (and unusual) sense, the Trustee, whose job it is to obtain the maximum return for the creditors, has less of a dog in this particular fight than do Woody and the Debtor. It would be fair to ask why should the trustee spend time and money in arguing over whether the claim of Woody is as he claims, or materially less by the proposed compromise, when Woody will receive all of the remaining assets of the estate if the claim is allowed in either amount. Those are things this Court believes are relevant considerations in deciding whether or not to approve the proposed compromise and specifically in evaluating the various factors which it must consider in deciding whether or not to do so.

II. Discussion

A. The Persons Involved

The persons involved and certain relevant facts are the following:

(a) Woody is the claimant. He worked for General Motors for a number of years. He has a high school diploma, but no college education. He saved somewhere around $275,000 over some 20 years through real estate investments, personal savings and retirement accounts. Between 1988 to 1993, he expended most of it by way of loans and/or investments through or with Roger Drury and/or his related entities.

(b) Roger Drury and Katherine Drury are the Debtors. Roger Drury ("Drury") is a entrepreneur who had several businesses, including Drury Trucking, Drury Farming, an entity called SCD, and others. Some of his businesses, including SCD and Drury Trucking, have either gone bankrupt or out of business. He had dealings over some 20 years with Alan Jory ("Jory"), Lewis Woody, Jr., and several others.

(c) Jory is the man who introduced Woody to Drury and acted in some ways as an intermediary between them. Jory ran what apparently was primarily a real estate brokerage company called Realty World, and was present at almost all of the closings involving investment transactions between Drury and Woody at one point. Jory was incarcerated in connection with a check kiting scheme.

(d) Dawn Hittle is Roger and Katherine Drury's daughter. She is the only one who testified directly on behalf of the Debtors.

(e) Bob Wager, an employee of Mr. Drury's during the relevant time period, is apparently the individual who kept records and/or had access to documents relating to the financial transactions between Woody and Drury. Wager was SCD's (and maybe other Jory's businesses') bookkeeper,

and worked out of the same physical office as Jory. Wager prepared the ledger summary attached to Woody's Proof of Claim. He left Drury's employment in 1994. He did not testify.

(f) Samuel Sweet is the Chapter 7 trustee, and it is his Motion to Compromise Woody's claim against the estate that is before the Court.

B. Documentary Evidence

There are few if any actual underlying documents supporting Woody's claim against the estate, though the evidence reveals the reason why, and the lack of such is not necessarily fatal to the claim.

Several documents relevant to this case, were put into evidence, including: (1) the Proof of Claim; (2) a two-page ledger of sheets attached to the Proof of Claim; (3) a Settlement Agreement between Drury, his company, SCD, and Woody and his company, LWJ Investments, Inc.; (4) a judgment from a 1996 lawsuit where Jory and his wife, a Mr. and Mrs. Luea, and Woody sued attorneys Holifield and Bunker for malpractice and fraud; (5) a settlement agreement entered into on September 30, 1996, between Jory and Drury; (6) an unsigned purchase agreement between Drury and Woody, for Woody's purchase of property on Miller Road; (7) records of Jory's check kiting "scheme", which apparently led to his incarceration; and, (8) a cancelled check written by Jory from SCD to Woody.

As noted, none of these documents (other than possibly the two-page ledger) clearly and unambiguously on their face as such prove Woody loaned Drury or Drury's companies money, at least in the way that promissory notes, receipts, cancelled checks in payment of a loan or closing statements in respect to property sales, the proceeds of which are claimed to have been waned, or bank records of deposits and disbursements might. However, it must be kept in mind that the issue

here is not the existence and exact amount of Woody's claim as such, but rather whether the evidence of its existence and amount such as sufficiently supports the Trustee's compromise motion.

C. The Testimony

1. Woody

His testimony touched on almost every aspect of this case. As noted, he had accumulated assets of some $275,000.00 from money saved through real estate investments and working overtime at General Motors. He first met Jory in 1979, who introduced him to Drury in the late 1980s, and began doing business with Drury through Jory almost immediately. He testified he loaned money to Drury through Jory's Realty World entity, or business - money which in material measure came from sales of property accumulated before meeting Drury. Realty World, in the person of Jory would handle those closings, and the net sale proceeds due Woody in most instances would be directed as loans to Drury or one of Drury's companies. Their relationship soured sometime in 1993.

When asked about any documents supporting the loans, Woody stated he thought there were many, such as cancelled checks, paperwork from the closings on the sales of his property and other files, but that those documents were kept at, and were taken or stolen or otherwise disappeared from, Realty World's offices incident to a claimed break-in in 1992, and were never recovered. Pre-trial efforts prior to the hearing conducted by this Court to obtain relevant checks and bank statements and the like going back that far were attempted but unavailing.

Woody testified he relied on the ledger document attached to the Proof of Claim to support his claim that he had made loans to Drury, the net unpaid amount of which was $197,236.44. He

testified that the aforesaid ledger was created by Bob Wager and identified loans he made to Roger Drury or Drury's companies and repayments by them.

Woody testified about a settlement agreement he and Drury discussed on October 29, 1996. According to Woody, that agreement provided for Drury to transfer to Woody property on Miller Road in exchange for Woody giving up any claims he may have had against Drury or SCD. Woody testified that he and Dawn Hittle were the only people present at those negotiations, and that the agreement was never consummated because of Drury's failure to convey to him the Miller Road Property.

Woody also testified that while the majority of the loans in various amounts at various times had to do with the purchase and development of a 1,200-acre piece of land Drury purchased from the Teamsters, there were other loans, and that not all of his transactions with Drury were loans; i.e., a few were investments. For example, there was a property called the Cold Creek Golf Course project which was an investment rather than a loan (and with respect to which he doesn't expect to be paid back).

The Court's own questioning of Woody related primarily to the chronology of events. The referred to ledger shows, and is limited to, alleged loan transactions between January 1992, and August, 1993. Jory had physically handed Woody that two-page ledger after it was obtained by way of subpoena during the referred to the 1996 lawsuit against the attorneys for malpractice. The Realty World break-in occurred some one or two years after Woody had obtained the ledger document and Woody did not make any loans to Drury after the break-in.

There were some deficiencies and minor disagreements in details and lack of knowledge as to some.

2. Jory

Jory had some personal knowledge of the transactions. He introduced Woody to Drury, and as noted, acted as a sort of intermediary between the two. He likely received some compensation from one or the other of the Debtors and/or the Drury's incident to the referred to transactions. His testimony generally supported Woody's understanding of the facts. Specifically, he testified to the following:

(a) he met Drury sometime in 1987 or 1988, and they began doing business together immediately. Their first deal was the 1200-acre Teamster owned property which they purchased on land contract for $1,000,000. They re-zoned and developed the property for condominiums and office space. Jory testified that Woody, whom Jory describes as hard-working and honest, became involved in this transaction (by loaning Drury $10,000 to help afford the initial purchase requirements).

(b) as to Realty World's involvement in the transactions between Woody and Drury, Realty World would list as a broker, and then sell, Woody's properties. Closings took place at Realty World and the sale proceeds were deposited to Woody's credit or benefit in a Realty World account, from which loans to Drury were made in the form of disbursements to various of Drury's businesses, like SCD.

(c) Drury used Woody's money in a number of different ways, such as for example, (a) making payments on the referred to 1200-acre Teamster land contract, and (b) $40,000 for material for construction of improvements on property on Seymour Road owned by either Drury and his wife, or SCD.

(d) There was also the Crosswinds Golf Course property, the original purchase of which was on a land contract, by a group including Woody, Jory, Drury and others as vendees. Woody apparently 'loaned' Drury money to help purchase the property. The initial purchasing group then defaulted and lost the property on foreclosure after which Drury and Woody repurchased it, but under circumstances which lead to a number of lawsuits one of which was the referred to 1996 malpractice lawsuit by Woody against Drury's attorneys in which Woody obtained and recorded a substantial judgment. In that situation there is a material question as to whether or not some of the money Woody contributed was an investment, as opposed to a loan.

(e) Bob Wager, the apparent employee bookkeeper for Realty World or Drury on one of Drury's entities, kept or had direct access to the underlying records of the Woody loans, which were recorded and identified in the ledger attached to the Proof of Claim. He and Jory physically worked in a common or connected office. Jory testified that the decreasing amounts shown on the two-page ledger represented funds SCD or Drury borrowed from Woody, and that increases represented payments Woody received from Drury or SCD. Jory also stated that Woody does not owe Drury any money, and that Drury owes Woody almost $200,000.00. Jory's credibility was attacked by reference to his incarceration in conjunction with his "check kiting scheme," the substance of which was that he would write a check drawn on a Realty World account to one of Drury's companies in order to cover its payroll or other expenses or that of another Drury company, but then actually deposit the checks back into the Realty World account. Jory testified that Drury was aware or part of the scheme. Jory was the one who wrote the checks, as the result of which he was sent to prison for six months, but with an understanding that during that period Drury would continue to run the businesses for both of their benefit.

(f) Shortly after Jory was incarcerated, Drury ceased all business operations, and there occurred the referred to break-in at the Realty World offices, as a result of which many records were taken or disappered, including apparently records of all of Woody's closings through Realty World.

(g) Jory also testified about the attempted settlement between Drury and Woody under which Woody agreed to release any claim he had against Drury (and vice versa) or SCD in exchange for Drury conveying to Woody the Miller Road property. The agreement called for Woody to in effect purchase the property for a stated consideration (the property apparently having a materially greater value at the time). Jory testified that agreement was never consummated.

3. Samuel D. Sweet, the Chapter 7 Trustee.

He testified to the substantial work and investigation he conducted before reaching his decision to compromise Woody's claim. Sweet spoke to most, if not all, of the involved available persons. The Bankruptcy Estate has around $120,000.00 on hand, and Woody is the principal, remaining unpaid creditor.

Sweet also reviewed all of the documents he could find relating to Woody's alleged loans to Drury, including the Proof of Claim, various other documents, a videotape of Bob Wager's deposition, available records of offers to purchase property between Woody and Drury, the settlement document between Woody and Drury, the judgments Woody and others obtained, and the documents related to Jory's conviction for the check kiting scheme.

Sweet testified that in reaching his compromise with Woody after objecting to Woody's claim, it became clear to him that the matter was complex and difficult, in part made so by the absence of underlying records, but that in essence he believed as between Drury on the one hand and Woody & Jory on the other, the latter were more credible, at least to the point of allowing Woody's

claim to the extent of $135,000. Based on such, Sweet believes Woody's probability of success if the validity of the claim was litigated was relatively high.

Sweet testified that the costs of litigating the claim to its conclusion if the proposed compromise is disallowed would be at least $10,000.00 more, and that expert testimony would be required, as well as more extensive investigation and reconstruction of the various underlying sales of Woody's property and Drury's purchase transactions, bank records, etc.

4. Dawn Hittle

Her testimony ended up being largely irrelevant because she admitted on cross examination that she had no personal knowledge of the Woody/Drury transactions, given that her primary employment with Drury commenced in October 1993, after Woody's alleged last loan. She also testified about the break-in and removal or loss of the records from the Realty World/SCD offices–the details of which do not bear materially on what is before the Court.

III. Analysis

A. Standard for disposition of proposed settlement/compromise

The law favors compromise, but any proposed compromise or settlement must be in the best interests of the estate. "In considering a proposed compromise, the bankruptcy court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. The court is not permitted to act as a mere rubber stamp or to rely on the trustee's word that the compromise is 'reasonable.'" Reynolds v. Commissioner, 861 F.2d 469, 473 (6th Cir. 1988).

> "There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an

> educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of the litigation."

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25, 20 L.Ed. 2d 1, 88 S. Ct. 1157 (1968).

In determining whether a proposed compromise or settlement is "fair and equitable," courts should consider the following factors:

> (1) The balance between the likelihood of the plaintiff's or defendant's success should the case go to trial compared to the present and future benefits offered by the settlement;
> (2) The prospect of complex, costly and protracted litigation if the settlement is not approved;
> (3) The proposition of class members who do not object or who affirmatively support the proposed settlement;
> (4) The competency and experience of counsel who support the settlement;
> (5) The relative benefits to be received by individuals or groups within the class;
> (6) The nature and breadth of releases to be obtained by officers and directors; and
> (7) The extent to which the settlement is the product of arm's length bargaining (i.e., whether the agreement was reached between insiders without creditor participation).

In re Dow Corning, 192 B.R. 415, 421-22, (Bankr. E.D.Mich. 1996).

B. Application of the Standard

1. Probability of Success

The subject of the proposed compromise is a proof of claim filed by a creditor which under FRBankrP 3001(f) has the effect of constituting "prima facie evidence of the validity and amount of the claim." A claim objector thus has the burden of going forward and introducing evidence sufficient to rebut the presumption of the prima facie case. This burden is met by producing

evidence sufficient to show a true dispute with probative force equal to the claim's contents, which if accomplished, results in the claimant then bearing the ultimate burden of persuasion by a preponderance standard. In re Campbell, 207 B.R. 861, 864 (Bkrtcy. E.D.Mich. 1997). It is important to understand this when evaluating the probability of success in potential litigation involving the existence and amount of a claim. As noted, in order for one who objects to a claim to force the claimant to prove the claim by a preponderance of the evidence the objector must first marshal enough evidence to rebut the presumption the claim is valid. The extent to which an objector would encounter difficulty in doing so bears importantly on the probability of the claimant's ultimate success (or the objector's lack of success) if a claims hearing were to go to final hearing and court decision.

The "hard" i.e., documentary evidence presented in this case consists primarily of the referred to ledger sheets attached to the proof of claim; a settlement agreement, and purchase agreement, and a cancelled check. The ledger sheets support the claim of the Debtor, but were obtained by Debtor through Jory, incident to yet other litigation involving the parties; the person or persons who apparently prepared the ledger did not testify before this Court, and Woody who could produce no direct evidence of making the loans which are the subject of the claim, was himself relying on those ledger sheets. The settlement agreement, at least on its face, would negative the claim completely, but for the assertion that part and parcel of that settlement and as argued by Woody a condition of its effectiveness, was the execution by Debtors of the purchase agreement and consummation of the sale contemplated thereby-things which never occurred says Woody. There is a reference in the settlement agreement, to a "purchase agreement" but nothing about whether or not the settlement's effectiveness was dependent upon the purchase agreement nor any description

of the subject of the purchase agreement; the referred to check would (if taken at face value and without tracing the source of the funds or what happened to them after they were apparently deposited in Wood's account) also as far as the Trustee was concerned, tended to negative at least in part Woody's claim, and, in much greater part than the compromise proposes. The Debtors did not testify. The persons or persons who actually apparently prepared the ledger sheets did not testify; the deposition of an accountant who apparently could possibly opine on the subject, while taken and referred to, was not put in evidence nor did he testify. Banks records which might go a long way in this situation were not produced. While efforts were made to obtain them, those efforts were not pursued to the point where the Court was able to conclude they were not available under any circumstances - and given the fact that this Court is dealing with the kind of truncated investigation that is all that is required in evaluating a compromise by a Trustee, that is perfectly understandable. As many hours as this Court spent hearing witnesses and in the production of evidence (and unusually so for a matter of this type) this Court has the abiding feeling that there is too much evidence that is not before the Court, and, there is much more that is relevant than meets the eye. The Trustee has been candid throughout that he is basing his position in proposing the compromise primarily and substantially on his view of the credibility of the Debtor. Indeed that may be well placed, but under the recited circumstances, that is too thin a reed to support a necessary conclusion that the probabilities of Woody suceeding in full blown litigation over his claim, are such as merit the proposed compromise. Furthermore, the Trustee, again candidly, said there really was no arithmetical basis for the proposed compromise at the proposed $134,000 level in the sense that there were identifiable loans and loan amounts made, at various identifiable times, the proofs of which, in contrast to the proofs of the others, were sufficiently deficient as to lend themselves to a

compromise calculable in that specific amount. Nor do the numbers on the ledger sheets appear to support such. Rather the compromise number appears to be the result of the Trustees general evaluation of his belief in the credibility of Woody coupled with a practical belief in the apparent fact that in terms of the ultimate outcome, there would be relatively little if any difference between that compromise amount and the original amount of the claim. While understandable, it is a consideration that needs to be taken into account in evaluating the compromise, as does the whole question of the Release and Settlement Agreement.

In essence and substance this is a fight only between Woody and the Debtors, in which the Trustee much more than is usually the case, is in the position of a stakeholder rather than an appropriate litigant. It is the former who should be the ones to litigate and/or compromise, and in doing so ultimately bear the financial burden of doing so in some appropriate proportion other than what results from the Trustee pursuing the matter in the way he has to date - clearly in effectuation of his proper role in a bankruptcy proceeding i.e., to evaluate, object if need be, and distribute and then close the estate as soon as possible.

As noted, a principle element in approving a compromise involves evaluating the probability of the protagonists success, but this Court can say that given the foregoing, the conclusion that Woody would likely be successful in asserting his claim in litigation defended by the Debtors, is based almost completely on the Trustee's conclusion that aside from any hard evidence (which is equivocal at best), Woody is simply a believable person or a more believable person. In a situation where it is the debtors and not other creditors who could benefit from the claim litigation, that is simply insufficient to support a compromise of the type proposed. There are no, or no materially relative benefits to be received by any other creditors as a result of the proposed compromise, and

importantly the compromise was not the product of arms length bargaining between the noted real parties in interest. The existence of a true adversarial relationship in our system is necessary to produce the elements and ingredients that go into an appropriate compromise of differences. That is what underlays one of the stated considerations the court should look at in evaluating a compromise - a consideration having more importance under the facts in this case, than possibly most others, i.e., the extent to which the compromise was the product of arms length bargaining. The Court is convinced that was not the case here, despite the good intentions and appropriate actions of the trustee. Other than having the matter finalized and the trustee being able to close the estate (a minimal consideration) the subject compromise cannot be said to significantly impact the best interests of the creditors in the larger sense, but rather it is in the best interest of the particular and virtually the only creditor involved. Where the claimant is virtually the only creditor and where in effect it will make little or no ultimate difference whether the claim as filed is allowed or whether it is allowed in a reduced amount, and even at the latter level, all of the estates net assets will, go to that creditor/claimant, then the compromise is irrelevant at best, and inappropriate at worst, in that it can be seen as a way of expediting the administration of the estate by utilizing, essentially on behalf of the claimant, the more easily satisfiable burdens of proof in an approval of a compromise context than those in a litigation context. If the interests of the debtor in a potentially surplus estate ought to be taken into account then the situation should be treated as essentially a matter between the claimant and the debtor and it should be their efforts and resources that are expended to resolve the controversy. It is up to the debtors, if they can, to rebut the presumption of the claims validity, and if they can do so, the claimant to prove his claim. In this Court's view, a compromise that might flow out of proceedings where those two intereted parties are the antagonists and are the ones who

agree on the compromise which is reached essentially without the intercession of the trustee on one side or the other, is more properly a compromise that would more properly meet the criteria for approval of a compromise in these circumstances.

The proceedings to date, extensive as they were, but deficient in the ways pointed out, do not meet that test and accordingly the motion to approve the compromise is denied. As a result, the matter of the allowance of the Woody claim should be set for trial, subject to Woody and the Debtors coming to some sort of settlement of that claim before then. Whether or not the Debtors have been able to rebut the presumption in the first place, or whether having done so, Woody would have fulfilled his burden of proof are, and should be, matters for the trial judge. If, as has been true so far, the Debtors and/or others with first hand knowledge of the facts do not testify or such evidence is not presented, and by reason of, such the trial judge concludes, for example, that the presumption has not be rebutted, and thus the claim, on a purely burden of proof basis, will be allowed as filed, will have to be then considered along with other relevant matters. The only caveat would be that if litigation over the claim, to be conducted primarily between Woody and the Debtors, takes so long as to impede the proper and final administration of this estate, a court might be well within its rights in taking a second look at any new request by the Trustee to compromise the claim in order to permit the orderly and prompt closing of the estate. Until then, the matter should proceed as indicated.

Entered: September 29, 2006

/s/ Walter Shapero
Walter Shapero

United States Bankruptcy Judge